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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 1425

BROADRIVER, INCORPORATED,

Petitioner,

—v.—

CITY OF STAMFORD, *et al.*,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CONNECTICUT

BRIEF FOR RESPONDENT IN OPPOSITION

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Opinions Below

The statement of the Opinions Below is adequately set forth in the Petition.

Jurisdiction

The Connecticut Supreme Court entered judgment on December 3, 1969, and the decision was announced on December 23, 1969. Petitioner's motion to reargue was denied on January 15, 1970.

This Court has no jurisdiction under 28 U.S.C. §1257(3) where a substantial federal question was not properly raised in the Connecticut Supreme Court proceedings below.

Questions Presented

1. Where Petitioner owned property containing less than one-quarter acre of land on which stood an admittedly substandard structure, in a total redevelopment project area encompassing 130 acres, and the redevelopment plan provided for Petitioner's property to be combined with additional property taken for redevelopment, was the Petitioner denied due process and equal protection of law because the property was to be redeveloped by a private individual other than Petitioner, even though Petitioner was willing, after the redevelopment plan was adopted, to redevelop his own property?

2. Was Petitioner denied due process when Respondent, acting at its peril, acquired title to Petitioner's property after Petitioner brought suit in the Connecticut Courts to restrain the taking of its property and, after a lengthy hearing, Petitioner's request for a temporary injunction was denied?

Additional Statutes and Practice Book Rules

Section 8-125, Connecticut General Statutes revision of 1958 printed in pertinent part in the Appendix, *infra*, p. 17.

Connecticut Practice Book 1963, §223, printed in the Appendix, *infra*, p. 17.

Statement of the Case

This case involves an action by a property owner of property in a validily constituted redevelopment area to enjoin the taking of its property.

The property involved is less than one-quarter acre in size and contains a substandard structure. The property is being acquired pursuant to an Urban Redevelopment plan for the City of Stamford which was adopted by the City in 1963. On July 14, 1966, the Urban Redevelopment Commission served the necessary papers upon the property owner to institute the proceedings by which the property was being condemned. Shortly thereafter, this injunction action to restrain the taking was started before any further steps had been taken to complete the acquisition of the property.

The Findings of the Trial Court indicate that this property was one of 424 structures in the redevelopment area to be demolished, the redevelopment area encompassing 130 acres.

Numerous reasons for the taking of this property may be found in the Finding of the Trial Court.

The property in question will be used in part for a new traffic artery and will be redeveloped in connection with other adjacent properties to connect the redevelopment area with an existing shopping complex; additionally, combination of this property with other properties will avoid multiple driveway accesses onto the new major thoroughfare.

On January 27, 1960 the URC entered into an agreement with Seon Pierre Bonan and the F. D. Rich Co., Inc., the so-called pre-selected sponsors of the redevelopment project.

In May of 1966 there was a meeting attended by Dr. Koffler, president of Petitioner corporation; Mr. Sydney Kweskin; Mrs. Dwight Marshall, chairman of the URC;

Mr. McCullough and Mr. Eugene Jones. This meeting was requested by Petitioner's attorney who indicated that Petitioner was determined to proceed with litigation to retain its property. At the meeting the reasons for the taking of Petitioner's property were explained. When Dr. Koffler suggested letting Petitioner redevelop its own property he was told that the property had to be developed as a unit and that further, the land in the project area for private development was to be first offered to the sponsor under an agreement with the sponsor. Although some discussion took place regarding a possible joint venture with the sponsor and a meeting with the sponsor was suggested by either Mr. McCullough or Mrs. Marshall, neither had authority to bind the commission at this meeting. However, a meeting with the sponsor did take place which proved unfruitful.

After the institution of the within lawsuit a hearing on a temporary injunction was held and said injunction was denied. Thereafter the permanent injunction was denied after a hearing and the Supreme Court of Connecticut affirmed the decision below.

Argument

Regardless of how vigorously Petitioner argues that the present controversy presents new and vital constitutional questions, and regardless of the vast amount of dollars being spent on Urban Renewal in the United States today, this case does not warrant review by this Court on certiorari.

When trimmed down to its essence, this case involves the claim by a property owner whose property was taken

for urban redevelopment, that it is unconstitutional to allow a private redeveloper, other than Petitioner. to redevelop its property.

To discover the exact nature of the attack being made by Petitioner, this Court should not lose sight of the facts found by the Trial Court, unchallenged by Petitioner, that for twenty years Petitioner recognized the necessity for redevelopment of its property, but did nothing but let the property decline to a point where redevelopment was necessary. Now after a redevelopment plan is adopted, financing and a redeveloper obtained, Petitioner makes a claim that " . . . equal protection required that petitioner be given the opportunity to develop its own land" (Petition, p. 8) and that to allow a private redeveloper other than itself to develop the property is a taking for a private rather than public use.

Interestingly, there is no authority cited by Petitioner in its petition to support the proposition that equal protection requires that it be given the opportunity to develop its own property. In fact, this Court has decided the issue against Petitioner in the landmark case of *Berman* v. *Parker,* 348 U.S. 26 (1954).

The secondary issue raised in the petition questions the procedure of the Respondent in acquiring Petitioner's property, after a full hearing denying a temporary injunction against the taking of the property, but before the judgment of the trial court denying the permanent injunction.

Both issues Petitioner now seeks to have reviewed have already been decided by this Court.

I.

Petitioner should not be allowed to raise questions not raised below.

It is a basic tenet that the federal question sought to be put before the Supreme Court by virtue of a Writ of Certiorari must be timely raised in the State Court, and at a point considered appropriate under state procedure. Failure to do so is jurisdictional. *Amalgamated Ford Employee's Union* v. *Logan Valley Plan,* 391 U.S. 308, 334 (1968) (dissent).

In Connecticut there is a clear cut requirement that all claims of law be made in writing at the Trial Court. Conn. Pr. Bk. §223 (1963).

If the claim is not made in the Trial Court, the Connecticut Supreme Court is not required to consider such claim. *Maier* v. *Arsenault,* 140 Conn. 364, 370 (1953).

In the present case a review of the record reveals that the questions Petitioner seeks to have reviewed were not raised in the Trial Court, were not urged upon the Supreme Court of Connecticut and, therefore, were not considered by said Court.

Petitioner's first claim in his petition is that it was denied due process and equal protection of law by virtue of the disposition of its property by the Commission to a private redeveloper, as opposed to a claim that its very acquisition by the Commission was unconstitutional.

A careful review of the claims made before the Trial Court reveals that no such claim was then made. The only claim of a denial of a constitutional right in the Trial Court was that "the proposed *taking* of a portion of all of the plaintiff's property constitute[d] a violation of plaintiff's constitutional rights." (Emphasis added.) Petitioner cannot now seriously contend that its claim that the acquisition of its property was unconstitutional encompasses a right of review as to its ultimate disposition. The former does not include the latter and the latter cannot be reviewed at so late a date.

Even if Petitioner's argument, strained to its utmost, can be read as questioning the legality of the acquisition of its property, the decision to acquire cannot be reviewed by this Court. It is within the sound discretion of a redevelopment agency to decide which properties are to be acquired and included in a redevelopment plan.

> "It is not for the courts to oversee the choice of the boundary line nor to sit in review on the size of a particular project area. Once the question of the public purpose has been decided the amount and character of land to be taken for the project and the need for a particular tract to complete the integrated plan rests in the discretion of the legislative branch." *Berman* v. *Parker*, 348 U.S. 26, 35-36 (1954).

Furthermore, Petitioner claims that it was denied the protections of the Fourteenth Amendment by virtue of the taking of its property during the pendency of a suit brought to enjoin such taking. No claim is made in the Petition as to the constitutionality of the statutes authorizing the taking. The question raised is confined and limited to the

validity of the taking of Petitioner's property after the denial of a temporary injunction seeking to enjoin the taking but prior to a hearing on a permanent injunction. A search of the record reveals that no such claim was made to the Trial Court.

The only issue as framed below and as urged upon the Trial Court questioned the validity of §8-129 of the Connecticut General Statutes in so far as it provided Petitioner no opportunity to test the reasonableness of the taking in a statutory proceeding (R. 144, p. 43).[1] Not only has this claim been abandoned in the petition, but Petitioner now concedes the validity of §8-129 of the Connecticut General Statutes and argues for the first time that the action of the Commission in proceeding in due course to take its property, which action as will be clearly indicated herein was at its peril, was unconstitutional.

When claims made at such late dates are urged upon this Court, this Court lacks jurisdiction to entertain them.

Further evidence to support Respondent in its claim that no federal questions were raised below may be found in Petitioner's failure to comply with Rule 23.1.(f) of the Rules of the Supreme Court of the United States.

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[1] The designation above used refers to the official printed record of the Supreme Court of Connecticut, which record has been certified to this Court.

II.

Petitioner's claims are foreclosed by prior decisions.

The City of Stamford Urban Redevelopment Commission need not rely upon the fact that there is no federal question to be reviewed. Even if the issue were raised at the Trial Court and there were jurisdiction for this Court to review, the decision of the Connecticut Court in this case is in accordance with prior decisions of this Court.

The issue, raised by Petitioner for the first time in the Petition, questions the right to have the property acquired by the Commission and redeveloped by a private developer.

In *Berman* v. *Parker*, 348 U.S. 26 (1954), this Court considered a property owner's complaint that their property may not be constitutionally taken, because it was to be put under the management of a private and not public agency. No answer to this question could be given in better language than the language of this Court itself.

> ". . . Once the object is within the authority of Congress, the means by which it will be attained is also for Congress to determine. Here one of the means chosen is the use of private enterprise for redevelopment of the area. Appellants argue that this makes the project a taking from one businessman for the benefit of another businessman. But the means of executing the project are for Congress and Congress alone to determine, once the public purpose has been established. . . . The public end may be as well or better served through an agency of private enterprise than through a department of government—or so the

> Congress might conclude. We cannot say that public ownership is the sole method of promoting the public purposes of community redevelopment projects. What we have said also disposes of any contention concerning the fact that certain property owners in the area may be permitted to repurchase their properties for redevelopment in harmony with the over-all plan. That, too, is a legitimate means which Congress and its agencies may adopt, if they choose." (Citations omitted.) (*Berman* v. *Parker, supra,* at 33-34.)

The above quotation indicates that even where preference is given to some property owners whose property is taken for redevelopment to repurchase the property and redevelop it that equal protection has not been violated. Clearly, the case at bar does not violate the equal protection clause of the Constitution under the facts of this case.

In the present case, as in the *Berman* case, there is legislative authority given to the Commission to dispose of property to a private redeveloper. The General Statutes of Connecticut authorize the sale of the "whole or any part of a redevelopment area to the redeveloper," Conn. Gen. Stats., §8-137 (Rev. 1958), which redeveloper may be an "individual, group of individuals or corporation," Conn. Gen. Stats. §8-125(e) (Rev. 1958).

Mr. Justice Douglas, speaking for a unanimous Court in *Berman,* points out that what is involved in cases such as this is an exercise of the police power, which is a legislative concern over which the states have the right to set the guidelines for local affairs. *Berman* v. *Parker, supra,* at 32.

The singular factual difference between this case and *Berman* is in Petitioner's claims that the 1960 agreement,

with the sponsors, which provides that the Petitioner's property is to be redeveloped by them, denies it of equal protection of the law. This claim lacks merit.

The fact that an agreement was entered into with the sponsors in 1960 giving them rights as to redevelopment of property within the redevelopment area has no bearing on this case. Such a determination by the local Commission is administrative, and Petitioner has no greater rights as regards this decision than it does over the legislative determination that redevelopment property acquired from one private individual may be sold to a different private individual.

Moreover, the contract issue does not really raise any new or novel question. It relates merely to the mechanics by which the property is to be conveyed. Petitioner's claim herein raises the same issues, notwithstanding the contract. It is the disposition to a private individual other than itself of which Petitioner complains, not the fact that it was done pursuant to a contract.

Petitioner's reliance on the case of *Norwalk Core* v. *Norwalk Redevelopment Agency,* 395 F.2d 920 (1968) is misplaced. In the first instance that case holds only that the pleadings therein were sufficient to allege a violation of equal protection and due process so that the action should not have been summarily dismissed. Additionally, the *Norwalk Core* case cannot be taken out of context and applied to every case wherein a denial of equal protection of the law is claimed.

> "We cannot doubt the necessity of discretionary decision making in urban renewal planning. This necessity would render unfit for judicial decision many

questions concerning urban renewal. See Baker v. Carr, 369 U.S. 186, 217, 82 S. Ct. 691, 7 L. Ed. 663 (1962); cf. Berman v. Parker, 348 U.S. 26, 33, 75 S. Ct. 98, 99 L. Ed. 27 (1954). This does not mean, however, that every case or controversy touching this area lies beyond judicial cognizance. Case-by-case inquiry is necessary, with due regard for the need for judicially discoverable and manageable standards for resolving problems to be undertaken, and with recognition of the role played by the coordinate branches of the Federal Government in the planning and implementation of urban renewal. See Baker v. Carr, supra, 369 U.S. at 208-217, 82 S. Ct. at 691."

The *Norwalk Core* decision has no bearing on the constitutionality of a sale of property to a private redeveloper, and has no effect on the decision of *Berman* v. *Parker, supra.*

III.

The taking of Petitioner's property during the pendency of suit is constitutional.

At the outset, it is important to note that Petitioner does not challenge the constitutionality of §8-129 of the Connecticut General Statutes, which section provides for the procedural steps which must be followed by a redevelopment agency in acquiring a property in private ownership. Petitioner's argument goes further. In essence, Petitioner claims, that even though the above mentioned statute is constitutional, it has been denied due process by virtue of the Commission's acquisition of its property

pursuant to this statute, during the pendency of an injunction action brought by Petitioner to test the legality of the taking.

Petitioner alludes to the fact that the above mentioned statute is unconstitutional because a separate action must be instituted to protect its property rights instead of being able to raise the issue in the condemnation action.

The very fact the Petitioner must bring an independent action does not make the statute unconstitutional. Petitioner is protected by his privilege to apply to a Court and be heard. *Ewing* v. *Mytinger & Casselberry,* 339 U.S. 594, *rehearing denied,* 340 U.S. 857 (1950); *Buck* v. *Morris Park, Inc.,* 153 Conn. 290, *appeal dismissed,* 385 U.S. 2 (1965); *see, Yakus* v. *U.S.,* 321 U.S. 414 (1944).

Interestingly, in the petition itself Petitioner now concedes that it is relegated to bringing such independent action (Petition, p. 13).

Moreover, the facts in this case clearly indicate that Petitioner's rights have in fact been protected. The original lawsuit was brought to enjoin the taking of property before title was acquired by the commission. A full and adequate hearing on the merits was held by the Court on Petitioner's claim for a temporary injunction. Only after the Petitioner failed to show that even a temporary injunction should be granted was the property in fact acquired.

Petitioner's basic complaint is that the acquisition of its property during the pendency of its injunction action challenging the legality of the taking was unconstitutional. Petitioner claims to have irretrievably lost title to his property by virtue of this taking.

The fallacy of Petitioner's argument is apparent. This court has uniformly held that a party against whom an injunction is sought restraining it from acting in a specified manner may do the act against which the injunction is sought. If it be so done, the party acts at its peril and on the rendering of an adverse decision, the Court has the power and duty to restore the *status quo*. *Jones* v. *Securi-* power and duty to restore the *status quo*. *Jones* v. *SEC*, 298 U.S. 1 (1935); *Ramsburg* v. *American Investment Co. of Ill.*, 231 F.2d 333 (1956).

If Petitioner's argument were adopted, property owners similarly situated would have the awesome power of stifling any effort by a municipality to carry out its large scale redevelopment projects which have become the order of the day. Every property owner would have the power to bring an injunction action challenging the reasonableness of the taking as to himself and have any takings stayed until a final determination were made. Due Process and Equal Protection involves a proper balancing of equities and requires that the prior holdings of this Court be followed.

The argument of Petitioner that "title to his property is irretrievably lost" by the denial of a stay pending a determination on a permanent injunction, is simply not true. As can be seen by application of the above mentioned principle, Petitioner has lost nothing by the issuance of a Certificate of Taking during the pendency of its injunction proceeding. If Petitioner were successful in enjoining the taking, the Court would be duty-bound to restore Petitioner to the *status quo*. If Petitioner were denied an injunction, then, and only then, would Petitioner have "irretrievably lost" his property; and then only after a

full hearing as required by due process of law. This in fact was the holding of the Supreme Court of Connecticut (Petition, p. 28).

CONCLUSION

For the foregoing reasons it is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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May 11, 1970

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